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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 195

SAUL BIRNBAUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 373 F.2d 250.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1967. A petition for rehearing was denied on March 31, 1967 (Pet. App. B). Mr. Justice Harlan extended the time for filing a petition for a

writ of certiorari to May 29, 1967, and the petition was filed on May 26. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly admitted into evidence the testimony of a deceased witness taken at petitioner's first trial, although at the first trial a recording of a conversation with petitioner, not referred to in direct testimony, had not been turned over to the defense.

2. Whether the trial court's instructions were prejudicial to petitioner.

STATEMENT

On retrial,[1] petitioner was convicted by a jury in the United States District Court for the Southern District of New York of bribing an agent of the Internal Revenue Service and conspiring to do so, in violation of 18 U.S.C. 201 and 371. On April 1, 1966, he was sentenced to imprisonment for one year on each count, the sentences to run concurrently. The court of appeals affirmed, one judge dissenting (Pet. App. A).

1. Petitioner's conviction stems from his participation in the bribery of Harold Simon, an Internal Revenue agent, by Robert Leonhardt and Alexander Guterma.

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[1] Petitioner's first conviction was reversed by the court of appeals because of the improper admission of hearsay testimony (see 337 F.2d 490).

Petitioner was a certified public accountant, and a partner in a New York City firm which served as the accountant for Leonhardt and McGrath Securities Corporation. McGrath was owned jointly by Leonhardt and Guterma until April 1955, when Leonhardt purchased Guterma's entire interest (Tr. 223, 466). By a complicated series of transactions with Guterma, set forth in detail in the opinion below (Pet. App. A 4-7), Leonhardt made a profit in connection with the so-called Wickersham transaction which he regarded as long-term capital gain on his 1955 federal income tax return, prepared by petitioner's firm.

At the first trial Leonhardt testified[2] that in November 1956 he received a call from Simon, who explained that he had been assigned to audit the 1955 tax return of McGrath Securities (Tr. 646). Leonhardt anticipated that a review of the McGrath return would call for an examination of his personal return as well. He contacted petitioner, who stated that there was nothing to worry about. Petitioner told Leonhardt that he knew which revenue agents could be taken care of and that Simon was one of them (Tr. 648). In April 1957 petitioner told Leonhardt that Simon had agreed to approve the capital gains treatment of the Wickersham transaction for a payment of $5,000, and that Leonhardt was fortunate to get off so inexpensively (Tr. 649). Petitioner indicated that Guterma, who had retained most of

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[2] Leonhardt died before the second trial. The transcribed testimony which he gave at the first trial was read to the jury. See *infra*, p. 9.

the profit from the transaction, would also be brought into the matter (Tr. 649-650). In June petitioner told Leonhardt that his payment to the agent would have to be $25,000, which he should gladly agree to make (Tr. 651). After some discussion, Leonhardt agreed to give Simon $10,000 promptly, and an additional $5,000-$6,000 later, if he could afford it. On September 17, 1957, he gave petitioner $10,000 for Simon (Tr. 652).

Efforts to obtain more money from Leonhardt proved fruitless. Leonhardt testified that in April 1958 he met with petitioner and Simon at petitioner's office. Petitioner expressed his dissatisfaction with Leonhardt's continued failure to pay Simon, and remarked that Guterma had paid much more than the amount previously agreed upon by Leonhardt. Petitioner indicated that any future payments should be made directly to Simon (Tr. 655-656). Thereafter, Simon continued to press Leonhardt for money, but did not receive any additional amounts (Tr. 657).

Guterma and his assistant, Robert Eveleigh, also testified as government witnesses. Guterma stated that, in March 1957, Leonhardt advised him by telephone that his tax return was being audited and it appeared that the agent intended to disallow the Wickersham transaction as a long-term capital gain. Leonhardt assured Guterma that petitioner "was on top of the matter and was handling it in continued conference with the internal revenue agent" (Tr. 283-285). Leonhardt also reminded Guterma of his prior promise to compensate Leonhardt for any tax

liability incurred in the event of a disallowance (Tr. 286-287). One or two weeks later Leonhardt advised Guterma by telephone that he had arranged with Simon to approve the capital gains treatment of the Wickersham transaction for $20,000, and called upon Guterma for reimbursement (Tr. 288-289). The parties engaged in a heated argument, after which Leonhardt agreed to accept a $10,000 reimbursement from Guterma (Tr. 291).

Guterma further stated that, in April 1957, he agreed to meet with petitioner and Simon (Tr. 294). At this meeting Simon declared that he desired a payment of $20,000 from Guterma. Guterma demurred, claiming his agreement with Leonhardt called for a $10,000 payment. He asked Eveleigh to take petitioner and Simon into Eveleigh's office and settle the dispute (Tr. 302). Two hours later, they emerged from Eveleigh's office with an agreement that Simon would receive $10,000 plus 5,000 shares of Shawano Development Corporation stock (Tr. 305). Approximately one week later Guterma gave Eveleigh $10,000 for Simon (Tr. 312). Shortly thereafter Eveleigh advised Guterma that he had given the money and securities to Simon (Tr. 312).

Eveleigh testified that, after Guterma asked him to negotiate the terms of the bribe, a meeting was conducted with Eveleigh, petitioner, and Simon in Eveleigh's office. Simon asked to see Guterma's books of account, which Eveleigh produced (Tr. 1403). After reviewing them, Simon engaged in a discussion with petitioner, following which Eveleigh was advised that

Simon would handle the matter for $20,000 (Tr. 1404). Eveleigh decided that Guterma should be consulted. A conversation was held in Guterma's office between Guterma, Eveleigh and petitioner, resulting in Guterma's reluctant agreement to pay $10,000 (Tr. 1406). When Eveleigh and petitioner informed Simon of the agreement, he expressed dissatisfaction with the amount. He ultimately settled for payment by Guterma of 5,000 shares of Shawano stock in addition to the money (Tr. 1407-1408). About a week later, the parties again met in Eveleigh's office. Eveleigh had $10,000 (which he had received from Guterma) and the stock to give to Simon. Prior to the effectuation of payment, petitioner left the office, indicating that he did not desire to be present when the exchange was made (Tr. 1417). After payment had been made, Eveleigh called petitioner back into the room, and Simon said to petitioner, "It is all set" (Tr. 1418).

2. Acting under F.B.I. supervision,[3] on October 2, 1961, Leonhardt, carrying a concealed tape recorder, met with petitioner at the latter's office. A substan-

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[3] In July 1961 Leonhardt decided to report the bribery to the F.B.I. Thereafter, he agreed to cooperate with the authorities. On October 9, 1961, Leonhardt met with Simon at Leonhardt's apartment, at which time he turned over $1,250 in marked bills. The incident was filmed, and agents arrested Simon as he left the apartment (Tr. 1249-1253). Subsequently, Simon pleaded guilty to three counts of bribery, and was sentenced to imprisonment for concurrent terms of eighteen months and fined $2,000 (Tr. 1280). At petitioner's second trial the court barred the showing of the Leonhardt-Simon film (Tr. 1247).

tial portion of their lengthy conversation was recorded, and the recording was subsequently transcribed. Four days later, petitioner and Leonhardt conversed briefly by telephone, and this conversation was also recorded. At petitioner's first trial, the government did not examine Leonhardt about either recorded conversation. After his direct testimony, petitioner moved for the production of all pertinent statements pursuant to 18 U.S.C. 3500. Government counsel turned over a large number of statements, but declined, however, to give defense counsel the transcriptions of the Leonhardt-Birnbaum conversations of October 1961. The trial judge, after an *in camera* inspection, determined that there was no occasion to order the production of the transcripts dealing with the recorded conversations. Petitioner's counsel did not cross-examine Leonhardt with respect to the October conversations about which petitioner, as a party thereto, had knowledge.[4] However in closing argument at that trial, his counsel commented (1 Tr. 1542):[5]

> You remember that he [Leonhardt] said that he had been able and had kept up the personal relationship and that he was friendly with Simon, who he said had reported to him, Leonhardt, that Birnbaum had shared in the bribe. That's

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[4] As noted by the court of appeals in denying the petition for rehearing (Pet. App. B), petitioner knew at trial that the conversations had been recorded.

[5] The transcript of the first trial has been filed with the Clerk of this Court.

> what he said, and he had no hesitancy in saying it, but he never testified at any time in any conversation that he had said anything to Saul Birnbaum about such participation, and the reason he didn't was because even he couldn't swallow that much despite the fact that the garbage which he and Guterma and Eveleigh poured into the cans in which they sought to make an incinerator of this man's [Birnbaum's] reputation almost reached the level of indecency and beyond the credibility of man.
>
> You know very well that had there been such a conversation with Saul Birnbaum it would have been brought to your attention, and you know very well that the reason there was not such a conversation with Birnbaum was because it never happened.

On his first appeal petitioner raised as error the failure of the court to order the production to the Leonhardt-Birnbaum tapes. The court of appeals, while reversing on other grounds,[6] discussed this claim, and concluded that the trial judge's ruling was not clearly erroneous (337 F.2d at 498, cited in its second opinion, Pet. App. A 29). On this point the court there said:

> We have examined the transcripts of the conversations and despite appellant's argument that lack of mention of the earlier Simon-Leonhardt

[6] Reversal of the first conviction was based on the improper admission of a portion of Leonhardt's testimony found to be inadmissible as a hearsay statement of Simon's remarks (see Pet. App. A 29, n. 18). That portion was deleted from the testimony read to the jury at the second trial.

> conversations in itself could have proved valuable for impeachment purposes, we are unable to agree that the trial court's ruling can be fairly characterized as clearly erroneous. This determination does not mean that on a new trial when the facts may be developed in a different manner, a different position should not be taken and that the trial judge may not exercise his discretion in a different manner.

Leonhardt died before the commencement of petitioner's second trial. Prior to trial a district court judge (who did not preside at either trial) ordered that the transcripts of the Leonhardt-Birnbaum conversations be presented to defense counsel. The second trial judge allowed the government, over petitioner's objection, to introduce in evidence the transcript of Leonhardt's testimony at the first trial. Petitioner subsequently introduced the Leonhardt-Birnbaum conversations in evidence (Tr. 1747-1819), and argued their contents to the jury, stressing the fact that Leonhardt had not, in such conversations, mentioned the bribery of Simon (Tr. 1877).

ARGUMENT

1. Taking issue with the ruling on the prior appeal from his first conviction that it was not clearly erroneous for the trial judge to decline to turn over the recordings of Leonhardt's conversations with petitioner in October 1961, petitioner argues that such error so infected the cross-examination of Leonhardt at the first trial that it was improper to permit Leonhardt's testimony at the first trial to be used at the

second trial after Leonhardt's death. However, whether or not the recordings should have been turned over at the first trial, there was no error in admitting Leonhardt's testimony at the second trial. The October 1961 conversations, to which no reference was made in the government's case at either trial, had no direct bearing on the question of whether petitioner participated in the bribery of Simon in 1957 and 1958. Leonhardt was thoroughly cross-examined at the first trial with respect to his testimony directly relating to that issue, with the aid of all the material produced under 18 U.S.C. 3500. The 1961 recordings had only tangential bearing on the matters importantly at issue, *i.e.*, only to the extent that the defense could point out that, although cooperating with the government in 1961, Leonhardt did not, in the conversations with petitioner, accuse petitioner of participating in the bribery of Simon. At the trial which is presently under review, the defense could and in fact did bring out that fact, getting all possible impeaching value out of the recordings. The defense was allowed to put the recordings before the jury even though Leonhardt was not available to give any explanation he might have been able to offer with respect to his failure to accuse petitioner in those conversations. Under these circumstances, there was no reason not to apply the general rule permitting use of testimony given by a deceased witness at a prior trial.

This case is not, as petitioner assumes, governed by the ruling in *Dennis* v. *United States*, 384 U.S. 855,

868, n. 13, where, in holding that minutes of grand jury testimony should have been turned over to the defense, the Court noted that since, as to one witness, the omission to require production of his grand jury testimony could no longer be remedied, his prior trial testimony would no longer be available to the government. The grand jury testimony there at issue related directly to the events about which the witness testified for the government on direct examination and its usefulness rested on the extent to which the witness could be cross-examined on the basis thereof. Here, as we have shown, the recordings related neither to any direct testimony given by Leonhardt nor to the events at issue at the trial. Nor were the defendants in *Dennis* even generally aware of the substance of the deceased witness' grand jury testimony, unlike petitioner, who was a participant in the recorded conversations (see Pet. App. B 4, n. 1). Even assuming *arguendo* that the recordings should have been turned over at the first trial, the omission was effectively remedied at the second trial. The instant case thus essentially turns on its own particular facts, which are markedly different from those presented by the *Dennis* situation.[7]

2. The fairness of the court's instructions must, as petitioner admits, be judged in the context of the whole charge. When so read, we submit, the majority of the court below properly concluded

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[7] Similarly, the court of appeals' decisions cited by petitioner (Pet. 19-22) are quite plainly distinguishable (see Pet. App. B 2).

that the charge was not unfair, either in intent or in effect. The trial judge fulfilled his duty to "fairly and impartially state the issues and applicable law in logical sequence and in the common speech of man" so that the jury could "understand the issues and intelligently apply the law." *Elbel* v. *United States*, 364 F.2d 127, 134 (C.A. 10), certiorari denied, 385 U.S. 1014.[8]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1967

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[8] Petitioner's reference to government counsel's suggesting that the judge modify the language of one comment (Pet. 10) ignores the fact that subsequently, at the hearing on petitioner's sentence, counsel noted that he had misinterpreted the meaning of the questioned comment, and acknowledged his mistake as to any possible implications it might have had detrimental to the defendant (Tr. 2151-2152).

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